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RCVD PUC SEC BUR
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PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
http://www.irrc.state.pa.us

INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

June 13, 2022

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Keystone Building, 400 North Street
2nd Floor, North Wing
Harrisburg, PA 17120

Re: Regulation #57-335 (IRRC #3330) L-2019-3010267
Pennsylvania Public Utility Commission
Rulemaking Regarding Hazardous Liquid Public Utility Safety Standards at 52 Pa. Code
Chapter 59; Notice of Proposed Rulemaking

Dear Secretary Chiavetta:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Very truly yours,

David Sumner
Executive Director
sfh
Enclosure

cc: Honorable Robert M. Tomlinson, Majority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable Lisa M. Boscola, Minority Chairman, Senate Consumer Protection and Professional Licensure Committee
Honorable James Marshall, Majority Chairman, House Consumer Affairs Committee
Honorable Rob F. Matzie, Minority Chairman, House Consumer Affairs Committee
Amy Elliott, Esq., Office of Attorney General
Addie Abelson, Deputy General Counsel

Comments of the Independent Regulatory Review Commission



Pennsylvania Public Utility Commission Regulation #57-335 (IRRC #3330)

Rulemaking Regarding Hazardous Liquid Public Utility Safety Standards at 52 Pa. Code Chapter 59; Notice of Proposed Rulemaking

June 13, 2022

We submit for your consideration the following comments on the proposed rulemaking published in the February 12, 2022 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Pennsylvania Public Utility Commission (PUC) to respond to all comments received from us or any other source.

1. Statutory authority; Whether the regulation is consistent with the intent of the General Assembly; Possible conflict with or duplication of statutes or existing regulations.

The stated the intent of this rulemaking is to provide more comprehensive regulation of public utilities that transport petroleum products and other hazardous liquids in intrastate commerce. The PUC has cited 66 Pa.C.S. §§ 501(b) and 1501 as its statutory authority for this rulemaking. Section 501(b) of 66 Pa.C.S. is the PUC's general rulemaking authority. Section 1501 of 66 Pa.C.S. requires public utilities, in part, to "furnish and maintain adequate, efficient, safe, and reasonable service and facilities." According to the PUC, these two sections provide the general authority to "ensure, *inter alia*, the adequacy, efficiency, safety, and reasonableness of hazardous liquid public utility service and facilities."

As noted by the PUC, the Commonwealth participates as a certified state in the pipeline safety program administered by the United States Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) under 49 U.S.C.A. § 60105(a). Pursuant to 49 U.S.C.A. § 60105(b), certified states must adopt the minimum Federal pipeline safety standards. The PUC adopted those standards in Section 59.33(b) (relating to safety). This subsection states the following:

Safety code. The minimum safety standards for all natural gas and hazardous liquid public utilities in this Commonwealth shall be those issued under the pipeline safety laws as found in 49 U.S.C.A. §§ 60101 – 60503 and as implemented at 49 CFR Parts 191 – 193, 195 and 199, including all subsequent amendments thereto. Future Federal amendments to 49 CFR Parts 191 – 193, 195 and 199, as amended or modified by the Federal government, shall have the effect of amending or modifying the Commission's regulations with regard to the

minimum safety standards for all natural gas and hazardous liquid public utilities. The amendment or modification shall take effect 60 days after the effective date of the Federal amendment or modification, unless the Commission publishes a notice in the *Pennsylvania Bulletin* stating that the amendment or modification may not take effect.

The PUC explains that under 49 CFR Part 195, Appendix A certified states “may adopt additional more stringent standards so long as they are compatible” with Federal standards.

Commentators opposed to the rulemaking believe this proposed rulemaking is not compatible with Federal regulations. Those commentators have provided examples of new requirements in the proposed rulemaking that will conflict with existing Federal requirements. Commentators that support the rulemaking believe the PUC’s cited statutory authority provides them the authority to promulgate regulations that are necessary to protect the public health, safety and welfare, and also the environment. We do not question the PUC’s authority and duty to protect the citizens and the environment of the Commonwealth from the potential danger associated with transporting petroleum products and other hazardous liquids via pipelines. However, we do ask for further explanation in the Preamble to the final-form regulation of how the more stringent provisions of this rulemaking are compatible with the Federal standards of the PHMSA regulations, as also addressed in Comment #4. In addition, we ask the PUC to consider revisions to this rulemaking that do not create a stricter enforcement standard in the Commonwealth.

A second issue raised by commentators opposed to the rulemaking relates to a potential conflict with Act 127 of 2011, the Gas and Hazardous Liquids Pipeline Act (58 P.S. §§ 801.101 – 801.1101) (Act 127). These commentators believe the following language from Section 501(a) of Act 127 prohibits the PUC from promulgating regulations that are more stringent than Federal standards:

Commission authority. – The commission shall have general administrative authority to supervise and regulate pipeline operators within this Commonwealth consistent with Federal pipeline safety laws. The commission may adopt regulations, consistent with the Federal pipeline safety laws, as may be necessary or proper in the exercise of its powers and perform its duties under this act. **The regulations shall not be inconsistent with or greater or more stringent than the minimum standards and regulations adopted under the Federal pipeline safety law.**

58 P.S. § 801.501(a). [Emphasis added.]

In addition, opponents believe the proposed rulemaking will treat private pipelines and public utility pipelines carrying similar product differently. This will create a “two-tiered regulatory environment that is needlessly complex and without any demonstration that this will produce additional benefits to the public.”

Commentators that support the rulemaking provided comments stating Act 127 does not apply to public utilities and should not be an impediment to the promulgation of this rulemaking. They

again cite to the PUC's authority and duty to protect the citizens and environment of the Commonwealth. In the Preamble to the final-form rulemaking, we ask the PUC explain what its duties are under Act 127 and whether Act 127 is applicable to public utility pipelines. We also ask the PUC how it will regulate private and public utility pipelines if and when this rulemaking is finalized.

2. Protection of the public health, safety and welfare and the effect on this Commonwealth's natural resources.

Environmental advocates, private citizens and legislators have submitted comments in support of the rulemaking. An example of a recurring sentiment from many of the commentators is, "This rulemaking is an appropriate and desperately-needed response to years of advocacy calling for the Commission to step up to protect the public it serves."

These commentators have provided many specific suggestions on each section of the rulemaking that would increase the protection of the public health, safety and welfare of the Commonwealth's citizens and also the Commonwealth's natural resources. Suggestions have also been made to increase public awareness and participation in decisions regarding the construction, maintenance and operation of public utility pipelines. Some of the suggestions would expand the scope of the rulemaking and, in some instances, require legislative action in order for the suggestions to be implemented. Examples of these types of suggestions include: a best practices approach to regulating pipelines; inclusion of siting approval and setback provisions; enforcement mechanisms; enhanced communications with affected communities; requiring new certificates of convenience and necessity for conversion of existing oil and gas pipelines to highly volatile gas liquids; environmental justice considerations; additional study and reporting of pipeline performance and integrity; and coordination of effort with other regulatory agencies that oversee various aspects of the pipeline industry. While some of these suggestions might be beyond the scope of this rulemaking, we believe the suggestions are worthy of discussion and consideration for a future rulemaking package.

Finding common ground among those that support and oppose this rulemaking will not be an easy task. We acknowledge the work already done via the Advance Notice of Proposed Rulemaking issued by the PUC in June 2019 and encourage the PUC to continue its work with all members of the regulated community as it strives to provide a safe regulatory environment for the construction, operation and maintenance of public utility pipelines and also to increase public awareness and participation by communities affected by pipelines. If any of the advocates' suggested amendments are incorporated into the final-form rulemaking, we ask the PUC to be cognizant of the potential fiscal impact it may have on the oil and gas industry and consumers in general. As addressed in Comment #5, quantification of those costs or any potential savings, should be included in the Regulatory Analysis Form submitted with the final-form rulemaking.

3. Implementation procedures; Possible conflict with or duplication of statutes or existing regulations.

Several commentators have expressed concern with how this rulemaking will be implemented. There is confusion regarding the potential retroactive nature of the regulations and what specific

activities by a hazardous liquid public utility (HLPU) would trigger compliance obligations. Some commentators believe retroactive application would conflict with 49 U.S.C.A. § 60104(b).

In the Preamble to the final-form regulation, we ask the PUC to explain if existing pipelines that are the subject of this rulemaking and currently operating pipelines are grandfathered, and therefore not obligated to comply with the standards. We also ask the PUC to explain why the requirements potentially being imposed would not violate the Federal Pipeline Safety Act.

In addition, the phrase “or otherwise changing existing pipelines” is used in several sections of the regulation. Commentators seek clarity on this phrase and whether activities such as routine maintenance would require compliance with this regulation. We agree that the quoted phrase is vague and ask the PUC to clarify it and specifically detail what activities would require compliance obligations.

4. Need; Reasonableness; Possible conflict with or duplication of statutes or existing regulations.

In response to Question #10 of the Regulatory Analysis Form (RAF) submitted with this proposed rulemaking, the PUC explains the need for this rulemaking as follows:

A more comprehensive and complete regulatory framework for hazardous liquid public utilities in the Commonwealth is necessary to address the concerns of the public regarding aging pipeline infrastructure and pipeline integrity. Proponents of stronger regulations for new and existing pipelines have identified hazardous liquid public utility incidents like spills, leaks, sinkholes, and private well contamination to support their position. As noted in the response to No. 14, in 2019, the PUC entered an Advance Notice of Proposed Rulemaking (ANOPR) and solicited comments. In response, several commenters requested greater public awareness between hazardous liquid public utilities and the affected public, public officials, emergency responders, and school administrators near hazardous liquid pipelines.

The Preamble submitted with proposed rulemaking explains what changes are being made to the PUC’s existing regulations and a description of the new sections being proposed. However, it does not explain the rationale behind the new language and why more a more stringent standard is needed for the particular topic being addressed. We ask the PUC to provide additional information related to why the new language is needed and reasonable for each new section of the rulemaking. In addition, we ask the PUC to cite specific instances of pipeline spills, leaks, sinkholes and water contamination caused by or related to HLPU activity. The PUC should explain how the more stringent standards of this rulemaking would have prevented or curtailed those problems or incidents.

As noted by several commentators that oppose the proposed rulemaking, there are several PHMSA rulemakings underway at this time. If the PHMSA rulemakings provide for more stringent standards, we question the need for all new sections in this proposed rulemaking. We ask the PUC to monitor the progress of those rulemakings and, if any of those rulemakings are

finalized before this rulemaking is submitted in final-form, to make the appropriate revisions to this rulemaking.

5. Economic or fiscal impact; Direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector; Adverse effects on prices of goods and services, productivity or competition; Whether the regulation is supported by acceptable data; Compliance with the provisions of the RRA or the regulations of this Commission in promulgating the regulation.

This Commission's regulations in 1 Pa. Code § 305.1(b)(1) require an agency to submit a complete RAF when it delivers a proposed rulemaking. The RAF submitted by the PUC with this proposed rulemaking provides answers to all of the questions posed. However, answers to some of the questions do not provide sufficient information for this Commission to determine if the rulemaking is in the public interest. In addition, those opposed to the rulemaking, including 16 members of the House Environmental Resources and Energy Committee, have raised concerns regarding fiscal impact and a lack of data to support to the proposed rulemaking. We ask the PUC to provide more information in response to the following questions in the RAF:

- Question #18, related to how the benefits of the regulation outweigh any costs and adverse effects;
- Question #19, related to a specific estimate of costs and/or savings to the regulated community and how the estimates were derived;
- Question #23, related to a summary of costs and savings estimates for the regulated community, local government and state government for the current fiscal year and the next five fiscal years; and
- Question #28, related to whether data was the basis for this regulation.

Regarding Questions #18, #19 and #23, the PUC's decision to not perform a complete fiscal analysis of the proposed rulemaking and delay that analysis until the final-form rulemaking stage of the regulatory review process is problematic. As noted by a commentator, it prevents this Commission and the regulated public from evaluating the accuracy of the information. It is also not in compliance with Section 5(a)(4) of the RRA, which requires "[e]stimates of the direct and indirect costs to the Commonwealth, to its political subdivisions and to the private sector." 71 P.S. § 745.5(a)(4). We ask the PUC to work with the regulated community to ascertain the costs required to comply with the rulemaking, especially as it relates to the potential retroactive nature of it.

Another cost that should be considered is the cost to other entities in the oil and gas supply chain, including higher costs of product and potential disruption of service due to the more stringent standards as contemplated by Section 5.2(b)(1)(ii) of the RRA. We also ask the PUC to consult with those that support the rulemaking to quantify in economic terms the benefits this rulemaking will have for the Commonwealth and its citizens.

Regarding Question #28, the answer provided by the PUC indicates that data was not the basis for the rulemaking. Commentators that oppose the rulemaking question the appropriateness of this response and suggest that the PUC should provide scientific data to support their contention that more stringent standards are needed. Section 5.2(b)(7) of the RRA requires this Commission to consider when determining if a rulemaking is in the public interest is, “Whether the regulation is supported by acceptable data.” Therefore, we ask the PUC to include documentation, statistics, reports, studies or research to support the need for the more stringent standards contained in each section of the rulemaking.

6. Section 59.132. Definitions. – Need; Clarity; Reasonableness.

Affected public

This definition includes residents and places of congregation (businesses, schools, and the like) along the pipeline and the associated right-of-way within 1,000 feet, or within the lower flammability limit, of a pipeline or pipeline facility, whichever is greater. The Department of Environmental Protection (DEP) recommended two revisions to this definition. First, DEP requests clarification of how to identify residents and places of congregation and thereby determine compliance with the notification provisions in Sections 59.138 and 59.140 (relating to horizontal directional drilling and trenchless technology, or direct buried methodologies; and operation and maintenance). Second, DEP seeks clarification of how to measure the distance in the definition, that is, 1,000 feet from the limit of disturbance. We ask the PUC to consider clarifying this definition as suggested by DEP.

Emergency responders

This definition includes a list of local, county and city emergency responders. A commentator feels this definition is overly broad and not limited to those agencies along a pipeline route. We ask the PUC to consider clarifying this definition to specify local, county and city agencies along the pipeline route to mirror the definition of “public officials.”

Geotechnical hazard

A “geotechnical hazard” is defined as a “geological and environmental feature which may be caused by natural or human-induced conditions, involve long-term or short-term geological processes, and lead to widespread damage or risk.” A commentator stated this definition is vague, overbroad and subjective, making it difficult for pipeline owner to comply with Section 59.136 (relating to design requirements). A second commentator believes that it is not necessary for a geotechnical hazard to be both geological and environmental. We ask the PUC to clarify this definition to establish a standard that is achievable by the regulated community.

HLPSA – Hazardous Liquid Pipeline Safety Act of 1979

This definition cites a Federal statute and regulation. A commentator explains that the HLPSA was recodified in 1994 with provisions of the Natural Gas Pipeline Safety Act and suggests the

definition be revised to “Federal Pipeline Safety Act.” We ask the PUC to consider revising this definition as suggested to improve clarity and accuracy.

TT – Trenchless technology

This definition explains a type of subsurface construction work that requires few trenches or no trenches. DEP commented that this definition is based on its draft technical guidance document “Trenchless Technology Guidance,” Doc. No. 310-2100-003. DEP accepted public comments through May 18, 2022. It recommended that the agencies collaborate as they finalize the technical guidance document and this rulemaking package to discuss consistent definitions of this term or a basis for any differences. As addressed in Comment #12, we have concerns with the PUC basing this definition on DEP’s guidance document. We ask the PUC to revise this definition as necessary to align it with any revisions to Section 59.138.

7. Section 59.133. General. – Need; Statutory authority; Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors; Whether the regulation is supported by acceptable data; Clarity.

This section sets forth the general provisions applicable to HLPUs. As noted in Comments #4 and #5, we ask the PUC to explain its rationale for imposing more stringent standards and provide data to support its conclusions for all of the subsections of this section.

Subsection (a) Minimum safety standards.

This subsection adopts by reference minimum safety standards in 49 U.S.C.A. §§ 60101 – 60503 as implemented by 49 CFR Parts 195 and 199 with automatic adoption provisions for future changes to Federal regulations, including the following:

If future Federal amendments to 49 CFR Parts 195 and 199 have the effect of making a Federal PHMSA safety requirement more stringent than a like requirement under §§ 59.131 – 59.143 (relating to hazardous liquid public utility safety standards), the more stringent Federal safety standard shall control.

We have two concerns. First, the provision does not state how the PUC will ensure the regulated community is in compliance with the most current regulations when the Federal minimum standards are updated and the PUC’s regulations are not amended. The lack of explanation will require HLPUs to interpret and determine which set of regulations is more stringent – the federal or state standards. Second, the term “like requirement” lacks clarity. We ask the PUC to explain how this provision will be implemented and the timetables for the regulated community to comply with standards that may be updated. We also ask the PUC to clarify the term “like requirement.”

Subsection (d) Pipeline conversion.

Subsection (d) requires notification to the PUC's Pipeline Safety Section before a pipeline is converted from service not previously covered by the hazardous liquid pipeline safety standards. It also requires compliance with a PHMSA guidance document.

Subsection (d)(1) places notification requirements on an HLPU "converting a pipeline from service not previously covered by **this part.**" [Emphasis added.] This reference lacks clarity. As explained in the Preamble, this refers to pipelines "previously covered by the 'Hazardous Liquid Pipeline Safety Standards.'" It may be interpreted as 52 Pa. Code Part I. A commentator interpreted this as referencing 49 CFR Part 195. To ensure proper implementation of this regulation, we ask the PUC to clarify this citation to refer to specific regulations.

Additionally, subsection (d)(1) applies to pipelines already designed for bi-directional flow. A commentator stated an operating characteristic is not relevant when determining if a pipeline is subject to the the PHMSA's conversion-to-service requirements and urges elimination of this requirement. We ask the PUC to consider this recommendation and clarify this subsection by deleting this provision or explain why it is needed.

Subsection (d)(2) requires an HLPU to adhere to 49 CFR 195.5 and "Pipeline Safety: Guidance for Pipeline Flow Reversals, Product Changes and Conversion to Service," PHMSA Advisory Bulletin ADB-2014-04, and any updates thereto. The PUC stated in the Preamble that these "requirements will provide additional oversight for pipeline conversions." Commentators expressed concern with requiring compliance with PHMSA guidance "which is not legally required and does not have the force and effect of law" and can be modified without prior notice or stakeholder comment. They urge the PUC to eliminate this requirement. We concur with these concerns. We also ask the PUC to explain why it is necessary to include this guidance document in addition to the Federal regulation and, further, to consider eliminating this requirement.

8. Section 59.134. Accident reporting. – Need; Statutory authority; Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors; Whether the regulation is supported by acceptable data; Protection of the public health, safety and welfare.

This section contains standards for HLPUs to meet when reporting an accident. As noted in Comments #4 and #5, we ask the PUC to explain its rationale for imposing more stringent standards and provide data to support its conclusions for all of the subsections of this section.

Subsection (b) Failure analysis reports.

Subsection (c) Root cause analysis reports.

These subsections require an HLPU to provide failure and root cause analysis reports conducted by an independent third-party following an accident that causes a result identified in 49 CFR 195.50. A commentator stated the PUC has not identified inadequacies in the reporting and analysis requirements in 49 CFR Part 195 or justified the need for additional requirements. The

commentator also states that the PUC does not provide a rationale for requiring these reports to be conducted by an independent third-party. In addition, another commentator contends that Federal regulations provide for an HLP to conduct its own analysis of pipeline accidents. As addressed in Comments #4 and #5, we ask the PUC to explain its rationale for imposing more stringent standards and provide data to support its conclusions.

Subsection (d) Process for obtaining approval of a third-party laboratory and consultant.

This subsection requires an HLP to obtain approval by the PUC's Pipeline Safety Section of a third-party laboratory or consultant to conduct the analyses required under subsections (b) and (c), respectively. This subsection includes timeframes for submission of recommendations, responses and determinations. A commentator states that this process is untenable and the timeframe for compliance presents an undue burden on HLPs. The commentator also suggests the PUC allow use of an approved vendor without the need for reapproval. We ask the PUC to explain why it is necessary to require an HLP to engage in this process, and the reasonableness of the implementation procedures and timetables for compliance. Further, the PUC should consider allowing the use of preapproved vendors as suggested by the commentator.

9. Section 59.135. Construction, operation and maintenance, and other reports. – Need; Statutory authority; Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors; Whether the regulation is supported by acceptable data.

This section sets forth reporting standards for construction, operation, maintenance and other activities. As noted in Comments #4 and #5, we ask the PUC to explain its rationale for imposing more stringent standards and provide data to support its conclusions for all of the subsections of this section.

Subsection (b) Timeframe for notice.

Subsection (b) requires notification to the PUC's Pipeline Safety Section of numerous actions taken by an HLP. Several commentators have concerns regarding implementation of this subsection and a perceived requirement to obtain approval of these actions. These commentators also question the need for notification timeframes ranging from 10 days to 45 days and the reasonableness of monetary thresholds. We ask the PUC to explain how this subsection will be implemented and why the timeframes for compliance and monetary thresholds are reasonable.

In addition, subsection (b)(3) requires an HLP to notify the PUC's Pipeline Safety Section of excavation damages and washouts immediately. A commentator suggests this timeframe be revised to "upon confirmed discovery" as defined in 49 CFR 195.2. We ask the PUC to consider revising this implementation procedure to establish a more practical standard for HLPs.

10. Section 59.136. Design requirements. – Need; Statutory authority; Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors; Whether the regulation is supported by acceptable data; Fiscal impact.

Subsection (a) establishes design requirements for an HLPU and subsection (b) requires an HLPU to account for external loads listed in 49 CFR 195.110(a) and anticipated external loads from landslides, sinkholes, subsidence and other geotechnical hazards. Commentators expressed numerous concerns with these subsections relating to fiscal impact and need given the Federal regulations. As addressed in Comment #3, we ask the PUC to explain if existing pipelines are subject to this regulation. As addressed in Comments #4 and #5, we ask the PUC to explain its rationale for imposing more stringent standards and provide data to support its conclusions.

11. Section 59.137. Construction. – Need; Statutory authority; Fiscal impact; Clarity; Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors; Whether the regulation is supported by acceptable data.

This section sets forth construction requirements for HLPUs. As noted in Comments #4 and #5, we ask the PUC to explain its rationale for imposing more stringent standards and provide data to support its conclusions for all of the subsections of this section.

Subsection (g) Valves for pipelines transporting HVLs.

Subsection (g) requires HPLUs to install emergency flow restrictive devices, install valves based on proximity to certain buildings, and develop and maintain a risk-based plan to address valve spacing.

Subsection (g)(1) requires installation of an emergency flow restricting device on a main line with lateral spacing not to exceed five miles. Commentators stated this requirement is expensive, arbitrary and lacking technical justification. We ask the PUC to explain the need and rationale for this requirement. Further, we ask the PUC to address the commentator's concern with fiscal impact and data as addressed in Comment #5.

Subsection (g)(2) requires the installation of valves based on a pipeline's **proximity** to specific buildings within the outer most area of the lower flammability limit. [Emphasis added.] The term "proximity" is vague. We ask the PUC to clarify this term to establish a clear standard for implementation.

Subsection (h) Vehicle barriers.

This subsection requires installation of vehicle barriers at an above-ground valve station **adjacent** to a roadway designed and constructed to protect the station from the **largest types of vehicles**. [Emphasis added.] These terms are vague. We ask the PUC to clarify these terms to establish a clear standard for implementation.

In addition, a commentator explains that certain valves have natural berms or barriers that would render additional barriers unnecessary. The commentator asked that the PUC consider providing an exception based on the characteristics of the valve station. We concur and ask the PUC to revise this subsection or explain why it is not necessary to do so.

12. Section 59.138. Horizontal directional drilling and trenchless technology, or direct buried methodologies. – Need; Statutory authority; Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors; Whether the regulation is supported by acceptable data; Clarity.

This section sets forth requirements for an HLPUs using horizontal directional drilling, trenchless technology or direct buried methodologies in construction or operation and maintenance. As noted in Comments #4 and #5, we ask the PUC to explain its rationale for imposing more stringent standards and provide data to support its conclusions for all of the subsections of this section.

Compliance with DEP regulations and technical guidance

Subsection (c)(1) requires HLPUs to comply with DEP “Trenchless Technology Technical Guidance and subsequent updates thereto.” Subsections (d)(1) and (e)(1) include similar language and also require compliance with “relevant regulations” of DEP, “including but not limited to 25 Pa. Code § 78a.68a (relating to horizontal directional drilling for oil and gas pipelines), 25 Pa. Code Chapter 102 (relating to erosion and sediment control), 25 Pa. Code Chapter 105 (relating to dam safety and waterway management), and 25 Pa. Code Chapter 109 (relating to safe drinking water).”

We have four concerns with these provisions.

First, what authority does the PUC have to require compliance with DEP regulations and guidance?

Second, entities engaged in a particular regulated activity will have to comply with DEP regulations and abide by the technical guidance. What is the need for including references to those documents in this regulation?

Third, the phrase “including but not limited to” is problematic because it is vague and does not inform the regulated public of the full extent of what the requirements are.

Fourth, requiring compliance with a guidance document of another agency and subsequent updates to it is not appropriate language to include in a regulation. Requiring compliance with a guidance document via regulation would make that guidance document a de facto regulation. This is an inappropriate delegation of the PUC’s rulemaking authority. In addition, adopting subsequent updates that bypass the regulatory review process violates the laws of the Commonwealth that provide for proper and legal rulemaking. We ask the PUC to respond to these concerns and amend these subsections accordingly.

Comments and suggestions of DEP

DEP has submitted extensive comments on subsection (b), relating to notification, subsection (c), relating to geological and environmental impacts, subsection (d), relating to protection of water wells and supplies, and subsection (e), relating to adverse impacts to water wells and supplies. Their suggestions relate to improved clarity, better implementation procedures, increased public awareness and notification, more protective standards, and increased access to information and documentation from HLPUs by DEP. We urge the PUC to consult with and consider the recommendations of DEP. Both agencies should work together to create a regulatory framework that is within its own specific delegated statutory authority, clear and non-duplicative for all aspects of the regulated community, and protective of the environment and the citizens of the Commonwealth.

Subsection (a) Scope.

This subsection reads as follows:

This section establishes requirements for hazardous liquid public utilities using HDD, TT, or direct buried methodologies for constructing new pipelines, and converting, relocating, replacing, or otherwise changing existing pipelines (the foregoing terms individually or in the aggregate shall constitute the term "construction" for purposes of this section), or in the operation and maintenance O&M of pipelines.

We question the need for and clarity of the parenthetical definition of the term "construction." We note that Section 59.137 addresses construction and Section 59.140 addresses operation and maintenance. Since the term "construction" is used in multiple sections of this rulemaking, we recommend it be defined in Section 59.132 (relating to definitions).

Subsection (d) Protection of water wells and supplies.

This section requires an HLU to comply with specific DEP regulations and all DEP Trenchless Technology Technical Guidance when using horizontal directional drilling or trenchless technology for construction or operation and maintenance activities near private or public water supply sources, such as wells or reservoirs. In addition to our comment above on need and statutory authority, we raise the following concerns. First, a commentator stated HLPUs lack the authority to require public and private owners of water supplies to share location information. This would make compliance with subsection (d)(2) impracticable. The PUC should explain in the Preamble to the final-form rulemaking how an HLU can comply with this provision if the public and private owners are unwilling to provide the required information. Second, under subsection (d)(2), what is meant by the phrase "water supplies deemed at potential risk due to geological structures"? This should be clarified in the final-form regulation.

13. Section 59.139. Pressure testing. – Need; Statutory authority; Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors; Whether the regulation is supported by acceptable data; Clarity.

This section establishes requirements for HLPUs conducting pressure testing. As addressed in Comments #4 and #5, we ask the PUC to explain its rationale for imposing more stringent standards and provide data to support its conclusions for all of the subsections of this section.

Subsection (b) Hydrostatic testing and reassessment generally.

This subsection addresses hydrostatic testing and reassessment, and sets forth requirements for pipelines installed before 1970, pipelines installed after 1970 and pipelines that have been placed back in service after a leak has been repaired. Commentators have raised five concerns or questions. First, what is the rationale for different standards for pipelines before 1970 and after 1970? Second, commentators state that pipelines installed before 1970 were not designed for in-line inspections and compliance could cost billions of dollars. Third, as written, pipelines installed in 1970 would appear to be exempt from this sections of the regulation. Fourth, this subsection requires the use of “appropriate” in-line inspections every two years. That standard is vague. Fifth, this subsection and Subsection (c) call for an assessment using in-line inspection tools, but there is not sufficient detail to describe what constitutes a proper in-line inspection, whether the tool selection is appropriate, how an inspection is to be conducted, and how the data should be maintained, analyzed and used.

We ask the PUC to further explain the distinction between pre- and post-1970 pipelines and to consider the practical and financial implications of in-line inspections for pipelines constructed prior to 1970. We also ask the PUC to include clarifying language in the final-form regulation to address issues three through five noted above.

Subsection (c) Hydrostatic testing in HCAs.

This subsection addresses hydrostatic testing in high consequence areas. DEP submitted comments suggesting that HLPUs comply with its regulations for discharged water from hydrostatic testing of pipelines to waters of the Commonwealth. Under this rulemaking, how is discharged water to be managed by HLPUs? What is the cost associated with the management of discharged water? We ask the PUC to address these questions in the Preamble to the final-form regulation.

14. Section 59.140. Operation and maintenance. – Need; Statutory authority; Whether the regulation is consistent with the intent of the General Assembly; Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors; Whether the regulation is supported by acceptable data; Clarity; Protection of the public health, safety and welfare and the effect on this Commonwealth’s natural resources.

This section establishes requirements for an HLU operating and maintaining a pipeline. As addressed in Comments #4 and #5, we ask the PUC to explain its rationale for imposing more

stringent standards and provide data to support its conclusions for all of the subsections of this section.

Subsection (b) Emergency procedures manual and activities.

This subsection requires HLPUs to consult with emergency responders in developing and updating an emergency procedures manual.

We have three clarity concerns with subsection (b)(3). First, what is meant by “geographic area”? Second, what is meant by “table top drill”? Third, is it unclear how many drills must be conducted on an annual basis. Are separate drills required for each different pipeline and product in each geographic area? The PUC should explain how an HLU is to comply with this subsection in the Preamble to the final-form rulemaking and also amend the rulemaking to improve its clarity.

Subsection (c) Liaison activities with emergency responders.

This subsection addresses liaison activities as it pertains to emergency responders. A commentator is concerned that some of the information to be shared with emergency responders in this subsection is problematic because it could violate provisions of the Public Utility Confidential Security Information Disclosure Protection Act (35 P.S. §§ 2141.1 – 2141.6) and the Right-to-Know Law (65 P.S. § 67.708(b)). According to the commentator, these statutes protect certain confidential information of public utilities from public disclosure. In addition, they contend the requirements of this subsection go beyond the legislative intent of 66 Pa.C.S. § 1512, which sets forth what information must be shared and with whom it must be shared. The commentator believes these three statutes demonstrate that the information required to be shared under this subsection must be protected due to its sensitive nature. In the Preamble to the final-form regulation, we ask the PUC to explain why this subsection, as written, does not violate the statutes referenced. We also ask the PUC to consider revising this subsection to establish a standard that balances the sensitive information related to HLPUs while protecting the public health, safety and welfare.

We have similar concerns with subsection (d) and the sharing of information with the school administrators identified there.

In addition, under Subsection (c)(3), a commentator believes the term “hazard assessment zone analysis” lacks clarity and questions why the analysis must be conducted annually. We ask the PUC to clarify this term and to explain the rationale for an annual analysis.

Subsection (d) Liaison activities with school administrators when a school building or facility is located within 1,000 feet, or within the LFL, of a pipeline or pipeline facility, whichever is greater.

This subsection addresses liaison activities as it pertains to school administrators. A commentator believes the term “school” lacks clarity and questions if the term would include businesses or institutions such as daycares or colleges. We agree that the clarity of the

rulemaking would be improved if “school” were defined in Section 59.132 of the final-form regulation.

Subsection (g) Inspection of pipeline rights-of-way.

This subsection sets forth ground patrol requirements in non-high consequence areas and high consequence areas. A commentator suggested that aerial patrols are an effective method of performing inspections. We ask the PUC to consider this alternative and, if appropriate, include it in the final-form regulation.

Subsection (h) Leak detection and odorization.

This subsection sets forth requirements for leak detection systems and odorization of highly volatile liquid pipelines. As noted by a commentator, the requirement for a leak detection system to be capable of detecting a “small leak” is problematic because it does not set a specific standard. We ask the PUC to clarify what the actual compliance threshold is for detection of leaks.

15. Section 59.142. Land agents. – Need; Reasonableness.

This section requires a land agent employed or contracted by an HLPU to hold a valid Pennsylvania professional license as an attorney, real estate salesperson, real estate broker, professional engineer, professional land surveyor or professional geologist. In addition, the land agent’s Pennsylvania professional license must be in good standing during the performance of the land agent work or services on behalf of the HLPU. Commentators have raised two issues with this section that we believe require further explanation. First, they question the rationale for requiring one of the enumerated licenses. Second, they state the licenses listed represent only a fraction of the professionals who engage in pipeline infrastructure land acquisition. In the Preamble to the final-form rulemaking, we ask the PUC to explain why it believes the enumerated licenses are appropriate and the only professions capable of performing the required duties of a land agent.

16. Section 59.143. Corrosion control. – Need; Statutory authority; Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors; Whether the regulation is supported by acceptable data; Clarity.

This section establishes requirements for HLPUs protecting pipelines against corrosion. As addressed in Comments #4 and #5, we ask the PUC to explain its rationale for imposing more stringent standards and provide data to support its conclusions for all of the subsections of this section.

Subsection (b) Procedures.

This subsection requires written procedures for the design, installation, operation and maintenance of cathodic protection systems. Commentators are concerned with the requirement to “determine and document the average and the worst-case corrosion rate experienced for each

pipeline segment.” They question an operator’s ability to fulfill the requirement. In the Preamble to the final-form regulation, we ask the PUC to consult with the industry on how the requirement could be implemented and amend the rulemaking to allow for compliance.

Subsection (c) Criteria for cathodic protection.

This subsection addresses the level of cathodic protection that a cathodic protection system must provide. A commentator that developed the national standard on which the criteria are based, the Association for Materials Protection and Performance (AMPP), believes the criteria have been altered, are not reflective of their most recent standard and less stringent than the Federal regulations. Was it the intent of the PUC to deviate from the national standard and to promulgate a regulation that is less stringent than the Federal regulation? We ask the PUC to explain its intent in the Preamble to the final-form rulemaking.

Subsection (d) Adequacy of cathodic protection.

This subsection addresses the frequency at which an HLP is required to test a cathodically-protected pipeline. In addition to the overall need for this subsection, commentators question the rationale for testing twice a year under subsection (d)(1) and (2), the rationale for the frequency of inspections under subsection (d)(3) and (4), and the timeframes for initiating remedial measures under subsection (d)(5). We ask the PUC to provide further explanation of the need for and reasonableness of these requirements.

Subsection (e) Close interval surveys.

Subsection (e) requires an HLP to conduct close interval surveys, including paved surfaces, every three years and to adhere to the standards set forth in NACE International Standard Practice 0207-2007, Performing Close-Interval Potential Surveys and DC Surface Potential Gradient Surveys on Buried or Submerged Metallic Pipelines (March 10, 2007). AMPP stated the standard is being revised and the PUC should refer to the most recent version of it in the final-form regulation. They also question the rationale and practicability of requiring these surveys at arbitrary time intervals. We ask the PUC to ensure the final-form regulation includes a citation to the most recent version of this standard and to also explain rationale for this section.